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IN THE

Supreme Court of the United States

October Term 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
a Michigan corporation,

Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

SUPPLEMENTAL MEMORANDUM BRIEF IN SUPPORT OF STATEMENT AS TO JURISDICTION

Counsel for Appellee, Corporation Tax Appeal Board of Michigan, filed a statement opposing the jurisdiction, asserting that appellant is not engaged in foreign commerce by operating an international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, and therefore the annual tax for the privilege of engaging in the business of operating this international highway bridge is not imposed for the privilege of engaging in foreign commerce. Counsel mainly rely upon the cases of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Arkansas and Memphis Railway Bridge and Terminal*

Company v. State, 295 S. W. 378. These cases are both distinguishable from the case at bar.

It is the contention of the appellant that under its corporate charter it has only the power to own, operate and maintain this international highway bridge; that it has engaged in and can engage in no other business, and that this business is that of foreign commerce, so that the imposition of an annual privilege fee for the privilege of doing this business, which is the only business in which appellant can engage, is to impose a tax upon it for the privilege of engaging in foreign commerce, in contravention of the Commerce Clause of the Constitution of the United States.

The case of *Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U. S. 204, is here controlling. In that case the Covington & Cincinnati Bridge Company was organized under the laws of both Ohio and Kentucky, and built and itself operated (as does the Detroit International Bridge Company) a bridge spanning the Ohio River, charging toll for vehicular and pedestrian traffic crossing over this structure. Kentucky enacted certain laws in reference to the toll rate and operation of the bridge, which the Bridge Company in that case contended was in violation of the Commerce Clause of the Federal Constitution. According to Mr. Justice Brown of the United States Supreme Court, at page 217, there were two questions which had to be decided, being:—

> "First, whether such traffic across the river is interstate commerce; and second, whether *a bridge can be considered an instrument of such commerce.*
>
> The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, in which the

State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State.

* * * With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax is laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

Counsel for the Tax Appeal Board, the appellee, rely on the case of *Henderson Bridge Company v. Kentucky*, 166 U. S. 150, and *Arkansas & Memphis Ry. Bridge & Terminals Co. v. State*, 174 Ark. 420, 295 S. W. 378 (certiorari having been denied by the Supreme Court, 275 U. S. 548), in support of their contention that the appellant is not engaged in foreign commerce. Both of these cases are readily distinguishable from the case at bar.

In the *Henderson Bridge* case the Bridge Company maintained and operated a bridge structure across the Ohio River from Kentucky to Indiana. The Bridge Company was a corporation organized under the laws of Kentucky. The Bridge Company rented out the use of this railroad bridge to various railroad companies. The State of Kentucky, under the general tax laws, levied a tax upon the Bridge Company covering both its tangible and intangible property. Included in the assessment for intangible property was the franchise granted by the State of Kentucky to the incorporators for the privilege of being a Kentucky corporation, and the tax board there fixed a value of that franchise as an intangible asset of the corportion subject to taxation. The Bridge Company contended that the tax was a franchise tax or a privilege tax for the privilege of engaging in this interstate business, and being a tax upon the privilege of doing business violated the Commerce Clause of the United States. The court by a majority opinion, four of the Justices joining in a vigorous dissent, decided as appears on pg. 154 of the opinion:

> "The tax in controversy was nothing more than a tax on the intangible property of the Company in Kentucky."

The majority treated the tax as a direct personal property tax, including this franchise as an intangible asset. Clearly even though the bridge were engaged in interstate commerce, it was then and is now well decided that a direct property tax may be imposed by a sovereignty upon corporate assets located within that sovereignty, even though those assets are used exclusively in interstate commerce. *St. Louis & East St. Louis Ry Co. v. State of Missouri*, 256 U. S. 314; *United States Express Company v. Minnesota*, 223 U. S. 335; *Fargo v. Hart*, 193 U. S. 490; *Postal Telegraph & Cable Co. v. Charleston*, 153 U. S. 692, 700. The statement of the court on page 153, that the tax was not a tax on interstate commerce carried on by means of the bridge because the bridge did not transact such business, was unnecessary to that decision and is not now binding upon the court. Treating the tax as a direct property tax as distinguished from the tax for the privilege of doing business within the state as a corporation like the tax in the case at bar, the decision of the Supreme Court in the *Henderson* case would necessarily have been the same regardless of whether the Bridge Company were engaged in interstate commerce or not.

Four of the Justices joining in the dissenting opinion of the minority in the *Henderson* case differed from the majority of the court in determining the nature of the Kentucky tax, as well as on the question of whether or not the Bridge Company was engaged in interstate commerce. The minority of the court treated the Kentucky tax as a pure franchise or privilege tax, as distinguished from a direct property tax and submitted that in its opinion that this tax being imposed upon the privilege of doing the business in question and was unconstitutional as being a direct imposition of a tax for the privilege of doing interstate business.

The majority of the court in the *Henderson* case did not, by its opinion, consider that *Covington & Cincinnati Bridge Company* case overruled. On page 153 the court said:

> "The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, presented an entirely different question."

The *Covington* case is applicable to the case at bar. A regulation of tolls is a regulation of the doing of business over the bridge. In the case at bar an imposition of a privilege fee for the privilege of doing business, when the only business of the company is operating an international highway bridge of this character, is a regulation of foreign commerce. On the other hand, as has been pointed out hereinbefore, property of a corporation located within a state, though used in interstate commerce, may be subject to a direct property tax. Following this rule, the majority of the court in the *Henderson* case, treating the tax as a direct property tax on a portion of property (the value of the franchise) said to be located in the taxing state of Kentucky, held the tax not to be a burden upon interstate commerce. If the tax in the *Henderson* case were a privilege tax, as the minority of the court held it to be, then it would be imposed for the privilege of doing the interstate business and would be unconstitutional, just as the tax in the case at bar is unconstitutional.

The *Arkansas* case can be distinguished because there the Bridge Company did not itself operate the bridge, but leased the structure to other persons, who in turn operated the structure. As the court in the *Arkansas* case, said referring to the appellant, said, at page 425:

> *"It does not operate the bridge and does not carry either passengers or goods, in fact it does nothing*

in the way of commerce, either intrastate or interstate. It owns, leases, repairs and maintains the bridge across the Mississippi river, and, while the bridge may be an instrumentality of interstate commerce so far as the carriers are concerned, the bridge company has nothing whatever to do with carrying either freight or passengers and therefore does not use the bridge as an instrumentality for interstate commerce or any other kind of commerce."

And further at page 426:

"As we have said, the bridge company merely owns the bridge, *leases* it and maintains it. If a company owned a boat or a number of boats, and leased them to a carrier or to any person or corporation who used the boat in carrying persons or freight in interstate commerce, the boat would be used in interstate commerce, the carrier would be engaged in interstate commerce, but the owner of the boat would have no connection whatever with interstate commerce. And we therefore think that the bridge company in this case is not engaged in interstate commerce, and it is not engaged in the operation of an instrumentality used in interstate commerce."

In the case at bar, unlike the *Arkansas* case, the Detroit International Bridge Company itself operates the bridge over which people are transported from one country to another. The bridge is an instrumentality of foreign commerce and in operating the bridge, the appellant is engaged in the business of foreign commerce.

Counsel for the Corporation Tax Appeal Board cannot be sustained in their contention that the appellant is not engaged in foreign commerce.

It has been held that one engaged in maintaining in proper condition a bridge used as in instrumentality of interstate commerce is engaged in interstate commerce. In the case of *Pederson v. Delaware, Lackawanna & Western Rd. Co.*, 229 U. S. 146, one carrying materials to be used in repairing a bridge over which interstate trains moved was held to be engaged in interstate commerce, Mr. Justice Van Devanter, delivering the opinion of the court, there said among other things, at pg. 151:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

One engaged in cooking meals, making beds, etc., for a gang of bridge carpenters in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing bridges over which interstate trains moved was held to be engaged in interstate commerce. *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101. The court said, at pg. 103:—

> "Taking it to be settled by the decision of this court in *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152 that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it."

In *Kinzell v. Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, it was held that one engaged in connection with the construction of a fill to replace a trestle (bridge) over which interstate trains moved was engaged in interstate commerce.

The United States Supreme Court has gone so far to hold that *ownership only* of a railroad *wholly within one state leased* to a railroad company doing interstate business and having exclusive possession and control for a yearly money rental would subject the lessor owner to liability as being engaged in interstate commerce, where an injury was sustained by an employee in the course of movement by the lessee railroad of a train of wholly empty cars. *North Carolina Railroad Company v. Zachary*, 232 U. S. 248.

In *State v. Bates & Rogers Construction Company*, 91 Wash. 183, 157 Pac. 483, employes of an *independent contractor* constructing piers under and for the support of a bridge on the line of the Spokane International Railroad Company over which interstate and foreign traffic moved were held to be engaged in interstate and foreign commerce.

In the case at bar it is impossible to use the bridge in other than foreign commerce. From the very inception of its construction it has been exclusively an instrumentality of foreign commerce—physically incapable of any other use.

A company owning and operating ferry boats carrying passengers from one state to another or from this country to another has been held to be engaged in the business of interstate and foreign commerce. *Glouster Ferry Co. v. Pennsylvania,* 114 U. S. 196; *City of Sault Ste. Marie v. International Transit Co.,* 234 U. S. 333; *Mayor of Vadalia v. McNeeley,* 274 U. S. 676.

A company owning and operating a pipe line for gas or oil from one state to or through another state has been held by this court on several occasions to be engaged in the business of interstate commerce. *Ozark Pipe Line Corporation v. Monier, the State Tax Commission of Missouri,* 266 U. S. 555; *Eureka Pipe Line Co. v. Hallanan,* 257 U. S. 265; *United Fuel & Gas Co. v. Hallanan,* 257 U. S. 277.

To hold that the spanning of a stream by ferry boats from the shore of one state to that of another, or the spanning of distances by pipe lines through which gas or oil flows is interstate commerce, and on the other hand to contend, as does the Corporation Tax Appeal Board, that the spanning of the distance by a bridge over a navigable stream over which vehicles and pedestrians travel from the shore of one state to that of another state or country is not interstate or foreign commerce is to raise a fine distinction with no essential difference. The position is inconsistent and unsupportable.

The Detroit International Bridge Company, the appellant, transports passengers and vehicles over this struc-

ture as much as a ferry company, by its boats, transports its passengers, or as much as a pipe line company transports oil or gas. If the bridge were a swing or draw bridge actually moving and lifting the passengers and vehicles from one shore to another, that contention could not be raised. To hold that a swinging or draw bridge would thereby constitute the appellant's business as that of foreign commerce, and a stationary bridge, such as the one here involved, would not be foreign commerce, merely emphasizes the fine hairpoint distinction counsel for the appellee attempt to make. As has been pointed out hereinabove, this court has ruled out any attempt to distinguish a bridge from a ferry boat on the ground that one is movable and the other is a fixture in the *Covington Bridge Company* case, *supra*.

The United States Supreme Court has held that the Federal government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce. In the case of *Luxton v. North River Bridge Co.*, 153 U. S. 525, 530, the court said:

> "From these premises, the conclusion appears to be inevitable, that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."

This same rule was announced in the case of *California v. Central Pacific Ry. Co.*, 127 U. S. 1, 36; *Latinette v. City of St. Louis*, 201 Fed. 676; *Stockton v. Baltimore New York Ry. Co.*, 32 Fed. 9. If the ownership, operation and maintenance of a bridge from one state to another or from one country to another was not engaging in interstate or foreign commerce, then clearly the Federal government would have no power under the Commerce Clause of the Constitution to authorize a Federal corporation to construct such a bridge.

The Detroit International Bridge Company, the appellant, owning, operating and maintaining this highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, must be held to be engaged in foreign commerce.

It is respectfully submitted that the annual privilege tax of the State of Michigan seeks to impose upon the appellant a tax for the privilege of engaging in foreign commerce. Counsel for appellee contend that the annual privilege fee is imposed not for the business transacted or about to be transacted, but for the existence of the right to transact the business in question. Appellant under its corporate charter has only the right to engage in the business of owning, operating and maintaining this international highway bridge and no other business, and, therefore, it has only the right as a corporation to engage in the business of foreign commerce. To impose a privilege tax upon appellant for the privilege of engaging in this business (to wit, owning, operating and maintaining an international highway bridge) when that is the only business in which appellant engages and it is the only business which appellant has the right to engage in under the powers granted by its charter, is to impose a privilege tax upon the privilege of engaging in foreign commerce in violation of the Commerce Clause of the Constitution of the United States.

We respectfully submit that there is a substantial and important Federal question involved in this appeal.

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